Supreme Court, U.S.
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07-483

No.

In the
Supreme Court of the United States

FRANK LoCASCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant deprived of his Sixth Amendment right to the effective assistance of counsel where his trial attorney abandons a viable defense because he must abide by a joint defense plan that is no longer in his client's best interests?[1]

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[1] The scope and urgency of this question are enlarged by the realization that approximately 35% of all federal criminal prosecutions involve multiple defendants who are tried jointly.

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Petitioner Frank LoCascio respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 11, 2007.

OPINIONS BELOW

To conscientiously conduct an inventory of the opinions rendered in this case, which range across 15 years, is arduous. Back in 1992, Frank LoCascio was sentenced to life imprisonment for allegedly violating the RICO statute. The Second Circuit affirmed the conviction. *United States v. LoCascio*, 6 F.3d 924 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994) (No. 93-1420).

In 2003, Petitioner moved to vacate his sentence under the mantle of 28 U.S.C. § 2255, based upon newly discovered evidence, which established that he was deprived of his Sixth Amendment right to the effective assistance of counsel. The district court denied the motion without a hearing. *LoCascio v. United States*, 267 F. Supp. 2d 306 (E.D.N.Y. 2003). *See* App. 1.

However, the Second Circuit reversed and remanded the matter for a hearing to investigate whether Petitioner's counsel suffered from an actual conflict of interest that could have affected his representation. *LoCascio v. United States*, 395 F.3d 51 (2d Cir. 2005). App. 45.

Following the hearing, the district court again denied Petitioner's § 2255 motion. *LoCascio v. United States*, 462 F. Supp. 2d 333 (E.D.N.Y. 2005). App. 63. The Second Circuit affirmed the district court's decision. *LoCascio v. United States*, 473 F.3d 493 (2d Cir. 2007). App. 85. And, the court denied a petition for rehearing and suggestion for rehearing *en banc*. App. 97.

JURISDICTION

The Court of Appeals' judgment was entered on January 9, 2007. The Second Circuit denied rehearing by an order entered on July 11, 2007. The 90-day period for filing this petition for certiorari expires on Tuesday, October 9, 2007. *See* Rule 30.1. This Court's jurisdiction to review the Second Circuit's decision is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The central sequence of events that frame the issues presented by this Petition are unencumbered by any serious factual disputes. Thus, they can be introduced in a summary fashion. In 1992, Petitioner Frank LoCascio and John Gotti were tried jointly on racketeering charges in Brooklyn, New York. During the proceedings, Petitioner's lawyer, Anthony Cardinale, attempted to demonstrate to the jury that his client "had nothing to do with" the crimes charged against him (A. 193-95). To achieve this objective, he asked the government's chief witness, Salvatore Gravano, specific questions intended to establish Petitioner's lack of involvement in conduct in which Gotti was jointly charged.

Among the questions put to the cooperating witness were:

(1) "You know *my client* was charged with [a Connecticut gambling business] and he got no money from that, correct?";

(2) "*my client* was charged with [New York gambling operations] and do you have any knowledge of him getting any money from that?"; and

(3) "you don't have any personal knowledge of any money being given to *my client* that was the proceeds from any loan-sharking" (Tr. 4970-75) (emphasis supplied).

The witness responded favorably to counsel's sharply registered questions, confirming that he had no knowledge of Petitioner's participation in those offenses. Since the witness was charged as a co-conspirator, and was Gotti's closest advisor, this effectively exculpated Petitioner of those crimes (Tr. 4975).

Counsel was also going to confirm through the cooperating witness, in a similar fashion, that he had no knowledge of Petitioner's involvement in any conspiracy to murder Louis DiBono. This question was vital because the witness played an integral role in the DiBono murder, which was charged against both Gotti and Petitioner. Counsel believed that these were safe questions based on the prosecutor's direct examination and 3500 material furnished by the government (A. 197, 229).[1]

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[1] 18 U.S.C. § 3500 provides that a criminal defendant is entitled to discover prior statements of any government witness who testifies.

John Gotti Threatened to Kill Petitioner's Lawyer if He Cross-Examined the Government's Key Witness in a Way that Would Exonerate Petitioner at Gotti's Expense

However, while at the peak of his imposing cross-examination of the government's lead witness, counsel observed Gotti becoming "very upset, very angry" (A. 195). Then, during a lull in the trial, Gotti summoned counsel and threatened him, in a heavy quiet, that if he *ever* used the words "*my client*" in a question again without including Gotti, "*he would take care of*" the lawyer (A. 195) (emphasis supplied). This special vernacular was well understood by an experienced defense attorney like Anthony Cardinale. Simply put, it meant that he would either be *killed or seriously harmed.*

Counsel acknowledged that he was "*afraid*" of Gotti, who the government claimed was responsible for at least ten murders and was one of the most lethal and menacing forces in criminal history (A. 196). In other words, counsel believed that if he continued this line of questioning, which *deviated from the joint defense strategy* of presenting a unified front, and featured Petitioner's lack of involvement to the exclusion of Gotti, his life would be in jeopardy (A. 195).

The primacy of these facts takes on significant importance. From that time on, Petitioner's attorney had a terror he could tell no one. As a direct consequence of this sobering threat, counsel, now acting out of fear and burdened by this conflict, immediately stopped his well-directed line of examination, which could have established his client's lack of involvement in the only murder for which he was charged.

The threat to abide by a joint defense strategy resonated throughout the trial and grew much deeper as it progressed. Gotti actually reinforced his original threat by telling counsel, during a break in his closing argument, that he had "spent enough time on Frank LoCascio." And, he *demanded* that it was "time for counsel to start defending [Gotti] in the final argument" (A. 199; Tr. 7594). Because of this directive, *Petitioner's counsel devoted a large part of his final argument to John Gotti* instead of his own client (A. 199).[2]

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[2] The threats caused counsel to assign a crucial portion of his summation to his client's co-defendant, even though he knew that a defense lawyer's conventional practice is to dedicate his final argument to his own client and to concentrate on the charges against *him* (A. 199-200). The lack of any evidence that Petitioner had anything to do with the DiBono murder was extremely compelling. Here, there was *absolutely no proof* that Petitioner ordered the murder, implemented it, or participated in it in any way. He was not even present when Gotti allegedly gave the order to kill DiBono. Frank LoCascio's innocence was made to order for a powerful cross-examination and strong summation. A lawyer dedicated solely to Petitioner easily could have concentrated all of his efforts on this exculpatory evidence —

Moreover, after an instance when counsel met alone with his client, Gotti admonished him to "*never do it again*" (A. 200) (emphasis supplied). Following that edict, counsel never met alone with Petitioner.[3] In the end, Gotti's frightening decree — which, in reality, forced counsel to represent *both* defendants at trial — created an *actual conflict* of devastating consequences.

Significantly, Petitioner was *acquitted* of charges where his attorney was able to employ the line of questions about how his client had nothing to do with the charges, thus isolating Petitioner from Gotti.[4] However, Petitioner has been condemned to serve a life sentence for *murder* because his counsel was barred from asking key questions that could have exonerated him.

Years later, when the facts concerning counsel's actual conflict of interest were uncovered, it literally cracked the case wide open. A motion was then made under § 2255 to vacate Petitioner's conviction and life sentence.

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if not shackled by the conflict imposed by Gotti to stick to the joint defense plan.

[3] Instead, records from the Bureau of Prisons confirmed that counsel subsequently met with *Gotti* 10 to 15 times outside of Petitioner's presence! (A. 236-38). This reinforced the conflict and confirmed where counsel's true allegiance rested.

[4] For example, Petitioner was acquitted of charges relating to a gambling operation, about which counsel had cross-examined Gravano *before* the threat was imposed (A. 48).

"No One Would Question that a Credible Death Threat from a Co-Defendant Ordering a Lawyer to Sacrifice a Client's Interests Constitutes an Actual Conflict of Interest"

The district court denied Petitioner's § 2255 application (App. 1). However, the Second Circuit reversed and ordered a hearing to investigate the circumstances of the death threat and its consequences (App. 45). The court, in describing the sheer magnitude of the conflict, stated that "no one would question that a credible death threat from a co-defendant ordering a lawyer to sacrifice a client's interests constitutes an actual conflict of interest" (App. 56).

Nevertheless, of great significance to this Petition, the Second Circuit held in a defining sentence:

> LoCascio cannot now claim a lapse in representation simply because Gotti may have *threatened Cardinale to stick to the plan* that LoCascio had already agreed upon (App. 60) (emphasis supplied).[5]

On September 15, 2005, Petitioner's trial attorney, Anthony Cardinale, testified at the evidentiary hearing directed by the Second Circuit.

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[5] The court reasoned that "[i]f, independent of the threats, Cardinale's representation followed LoCascio's and Gotti's joint defense strategy and any failure to individuate LoCascio was the result of that strategy, the threats cannot be said to have caused Cardinale to forgo the alternative defense of separating LoCascio from Gotti at trial" (App. 60).

At a Hearing, Petitioner's Counsel Acknowledged that John Gotti Forced Him to Abandon a Line of Defense that Could Have Exculpated His Client of the Murder Charge

Counsel vividly described, at the hearing, in the most terrifying detail, Gotti's death threat and explained how it adversely affected his representation of Petitioner. For example, the attorney admitted that he was forced to *refrain* from asking any questions that were qualified by the phrase "*my client*" (A. 195) (emphasis supplied). The questions had to include John Gotti as well. However, given the overwhelming evidence against Gotti, this injunction meant that Petitioner's counsel could not pose isolating questions that would have elicited exculpatory answers regarding his client.

Even more alarming was counsel's *admission* that he had to *abandon an entire line of defense* that he believed was in his "client's best interests" (A. 195). And, because of his enforced allegiance to Gotti, imposed by the threat to stick to the joint defense, he could not ask planned questions that presumably would have been helpful to his client (A. 197).[6]

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[6] More specifically, as a result of this intimidation, counsel did not examine the government's chief witness concerning: (1) whether he ever had any conversations with Petitioner about DiBono and his murder; (2) whether the witness ever heard Petitioner discuss the DiBono murder; and (3) whether the witness had any personal knowledge of Petitioner's participation in activities related to the DiBono

Even though the lawyer explained how Gotti's threats adversely affected his representation of his own client — and even though *Petitioner never agreed that his attorney could act in Gotti's best interest at his expense*[7] — the district court, once again, denied Frank LoCascio's motion to vacate his conviction (App. 63; A.26). The district court also applied the wrong standard in judging this ineffectiveness claim.[8]

Despite these serious flaws in the application of the law of conflicts, the Second Circuit affirmed and held that "any failure to individuate LoCascio was the *result of the joint defense strategy* between LoCascio and Gotti, and not Gotti's alleged death threat against Cardinale" (App. 87) (emphasis supplied). Because of this grave conflict and its terrible consequences, Petitioner, who is 75 years old, will be left to die in prison unless this Court reviews his case.[9]

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murder (A. 197). Given the witness' central role in the murder, particular importance should be attached to these questions.

[7] Petitioner's uncontested sworn declaration provides that "[a]lthough my co-defendant and I had some issues in common, I at no time agreed that Mr. Cardinale could act in my co-defendant's best interest at my expense" (A. 55).

[8] The court mistakenly evoked *Strickland v. Washington*, 466 U.S. 668 (1984), which is used in conventional conflict claims, and requires a showing of prejudice to prevail (App. 81-82). However, in *actual conflict* of interest cases, such as this, prejudice is presumed. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980).

[9] Petitioner is incarcerated at the Federal Medical Center (FMC) Devens, in Massachusetts.

REASONS FOR GRANTING CERTIORARI

I. THE SECOND CIRCUIT'S RULING, WHICH ELEVATES A DEFENDANT'S DUE PROCESS RIGHT TO PRESENT A JOINT DEFENSE OVER HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

This Court has never addressed the question of what happens when an attorney's duty of loyalty to an individual client, dictated by the Sixth Amendment, clashes with his obligation to abide by a joint defense agreement, protected by the Fifth Amendment. The Second Circuit's recent ruling, that a joint defense strategy preempts a defendant's right to the effective assistance of counsel, presents an important issue of federal law that should be settled by this Court.

The Sixth Amendment guarantees to every defendant the right to the effective assistance of counsel. That basic constitutional doctrine includes a lawyer's duty to avoid conflicts of interest at all costs.[10] The ethic that accompanies such an undertaking requires an absolute commitment to the client's best interests. Moreover, because of the high place effective assistance of counsel occupies in our hierarchy of constitutional values, the corresponding imperative of loyalty imposed upon a lawyer is unconditional.[11]

Nevertheless, at the same time, there exists a competing duty to employ a joint defense, guaranteed under the due process clause of the Fifth Amendment. Indeed, as recognized by this Court, in many cases a common defense provides "strength against a common attack."[12]

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[10] The case that celebrates this rule is *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980).

[11] The right to the assistance of counsel forms the very heart and soul of our federal criminal justice system because it protects "the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684, citing *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938). The right is indispensable because it "assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1984). And, the "essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.*

[12] *See Burger v. Kemp*, 483 U.S. 776, 784 (1987), citing *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978), quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting).

A critical conflict frequently arises, however, when the Fifth Amendment right to present a joint defense compromises a lawyer's Sixth Amendment duty to his client. Here, the Second Circuit concluded that a lawyer's ineffectiveness could be absolved by a duty to comply with a pre-existing joint defense arrangement. Thus, this Court is called upon to resolve the ever-increasing tension between these irreconcilable interests, and to answer whether a joint defense should ever be allowed to override a defendant's Sixth Amendment right to *individual* representation.

We urge that under the constitutional necessities of the Sixth Amendment, the duty to provide a client with effective legal assistance should never be subordinated to a common defense strategy. And, even in the face of a joint defense plan, an attorney is duty bound to take action that is favorable to his client, despite any consequences to co-defendants. This is because a lawyer's first and only loyalty is to his own client. No constitutional duty of loyalty is owed to other defendants in a joint trial.

This issue is of mounting concern to judges, prosecutors and defense attorneys throughout the country, who are more and more often participating in prosecutions involving multiple defendants. In fact, the recurring nature of this question is greatly amplified by some startling statistics. For example, more than *one-third* of all federal prosecutions involve *multiple defendants*, in which *joint defense strategies* commonly exist.[13]

In addition, more criminal actions are commenced against defendants in the combined Eastern and Southern Districts of New York than in any of the other 94 federal districts.[14] Accordingly, the Second Circuit's contrary decision is certain to have a drastic effect on the rights of thousands of defendants because a valid ineffectiveness claim can now be flatly defeated by the mere existence of a common defense.

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[13] Approximately 35% of all federal criminal defendants are tried jointly — rather than alone. *See* Andrew D. Leipold, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349 (March 2006).

[14] *See* Annual Report of the Director: Judicial Business of the United States Courts, Table D, statistics relating to actions commenced in 2005, available at http://www.uscourts.gov/judbus2006/appendices/d0d.pdf. The only exceptions are portions of Texas and Virginia.

In light of the rivalry between these two competing constitutional policies, an examination of this issue is imperative. These are clearly propositions of the highest importance that have become seriously unsettled by the Second Circuit's decision. The circuit's holding, if left standing, constitutes a significant and unprecedented curtailment of a defendant's rights under the Sixth Amendment. If what the Second Circuit says is to become a part of the law governing Sixth Amendment claims, then *this Court* — not a circuit court — should make that ultimate decision. Thus, this Petition is accompanied by every compelling argument that has ever been made for ensuring that claims made by defendants who have been denied the effective assistance of counsel are not dismissed due to a joint defense strategy.

The arguments in favor of the Sixth Amendment's priority over a joint defense strategy are so necessarily humane that they literally echo down through history. But, despite this long and revered tradition, unfortunately, this is a question that requires definitive resolution by this Court.

Review is also necessitated because a joint defense strategy, which is intended as a *shield* to protect defendants acting in concert, has been converted here into a *sword* to strike down a defendant's constitutional right to conflict-free representation. However, a lawyer's singular dedication to his client should never be undercut by a joint defense.

Since ours is a human enterprise, lawyers are fallible. The Constitution, therefore, protects defendants against those human failures by providing them with a remedy where their attorney is ineffective. But, the Second Circuit's novel rule creates a significant exemption from that constitutional mandate. Now, a Sixth Amendment complaint can be denied if the lawyer's deficient acts can be exonerated by a joint defense.

"No Man Can Serve Two Masters"[15]

Another reason why the ruling below warrants review is the genuine fear that the vital guarantees of the Sixth Amendment will be rendered meaningless if a defendant cannot rely on his own lawyer's loyalty. This brand of devotion must compel counsel to invoke, on behalf of his client, all available legal and constitutional safeguards.

All of the growing public concerns regarding the continued viability of the Sixth Amendment have now been distilled into a single case. This Petition provides an ideal platform for resolving this deeply troubling and perennial question. In a word, Petitioner is serving a life sentence because his counsel was forced to abide by a joint defense strategy. At a hearing, his lawyer candidly *conceded* that he suffered from an *actual conflict of interest.* And, of crucial importance, he testified that because of that conflict he *forfeited a viable defense* that could have cleared his client of the only murder charge he faced. This frightening reality suggests the awful solemnity of the occasion that brings us to the gates of this Court seeking certiorari.

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[15] Matthew 6:24.

The Second Circuit held that the attorney had no conflict of interest even though a co-defendant *forced* him to *stick to a joint defense plan* that was detrimental to his client (App. 60). But, where an original joint defense plan turns out to be antagonistic to the client's well being, effective assistance entails acting in the client's best *individual* interests. In other words, where a client's interests subsequently deviate from a pre-existing joint defense strategy, the lawyer is obliged to depart from the plan and provide independent representation to his client. After all, "no man can serve two masters."

In *Glasser v. United States*, 315 U.S. 60, 75 (1942), the Court condemned a situation where an attorney "struggle[d] to serve two masters" at trial. And, although in *Holloway v. Arkansas*, 435 U.S. 475, 481-82 (1978), the Court found that joint representation is not *per se* violative of the Sixth Amendment, prejudice is still presumed.[16] The question left open by this Court in the wake of *Glasser*, *Holloway*, and their progeny, is the true role of a joint defense agreement in the Sixth Amendment context.

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[16] *See also Mickens v. Taylor*, 535 U.S. 162, 168 (2002) ("joint representation of conflicting interests is inherently suspect").

The continuing nature of this controversy is reflected in other petitions for certiorari where a joint defense was allowed to inhibit a claim of ineffective assistance of counsel. For example, in one case from the Fifth Circuit an attorney "chose to sacrifice his client's liberty out of 'loyalty to others'" and, therefore, *did not convey a plea offer to her, which included immunity, because of a joint defense agreement. See* Petition for Writ of Certiorari at 17, *Carol Peeler v. United States*, 513 U.S. 811 (1994) (No. 93-1836).

The decision from the Second Circuit — one of the most populous circuits in the country — has seriously threatened a large body of law concerning a defendant's right to independent counsel. The power of the protective provisions of the Sixth Amendment has been severely curtailed by the Second Circuit's decision, which is bound to give directions and carry implications far beyond the facts of this case.

It is worth remembering that, in this country, our legal system honors constitutional traditions and equal justice under the law. But, the strength of that system is sustained by a vigorous Bar that operates under the aegis of the Sixth Amendment. And, thus, the true caretakers of that system are the independent lawyers who labor in the trenches every day. It is this unwavering dedication and allegiance to this code that build a sense of confidence in the system of justice.

Finally, one of the most cherished policies of our nation is that all persons are entitled to a fair trial. Central among those great constitutional provisions is the Sixth Amendment's right to the *unconflicted* assistance of counsel. Therefore, when a lawyer assumes the solemn responsibility of defending a person charged with murder, professional imperatives are at their highest. Any agreement that undermines a lawyer's solitary devotion to a client should be viewed with alarm.

The Second Circuit has created an urgent need for this Court's guidance concerning the proper administration of joint defense strategies within the strict constitutional constraints of the Sixth Amendment. If this issue is left unresolved, it will have a calamitous impact on future Sixth Amendment claims. The magnitude of this vexing issue is also enlarged by the fact that ineffective assistance of counsel is the most frequent claim brought under 28 U.S.C. § 2255.[17]

This great constitutional right needs constant guarding. If we stand by and allow it to be overrun by lesser forces, then we will have weakened that essential safeguard for generations to come. And, then, we will all be the losers. As a consequence, review by this Court is needed at this time.

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[17] John M. Burkoff & Hope L. Hudson, *Ineffective Assistance of Counsel*, 1-3 (Clark Boardman Callaghan) (1994).

II. THERE IS A SHARP CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION AND THE OTHER CIRCUITS' HOLDINGS THAT A JOINT DEFENSE AGREEMENT DOES NOT REQUIRE AN ATTORNEY TO PLACE A CO-DEFENDANT'S INTERESTS ABOVE THOSE OF HIS INDIVIDUAL CLIENT

The Second Circuit's decision also stands in conflict with the Eleventh Circuit's decision in *United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003), as well as other circuit court decisions from across the country.

In *Almeida*, the Eleventh Circuit underscored that although "the Sixth Amendment right to have the effective assistance of counsel encompasses the right to have counsel untainted by conflicts of interest,"[18] the "*case law does not address* the much more tenuous claim of *ineffective representation that arises in the joint defense agreement scenario.*" 341 F.3d at 1323 (emphasis supplied).

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[18] Citing *Holloway* and *Cuyler*.

There, the circuit court confirmed that a joint defense agreement does not create a duty of loyalty to co-defendants. *Id.*[19] Thus, a common defense strategy could not override an attorney's duty to his individual client.

The Ninth Circuit has also adopted an approach that is at odds with the Second Circuit's reasoning concerning a defendant's waiver of his right to conflict-free representation.[20] In light of the sharp difference of interpretation regarding the duty of loyalty owed to co-defendants, consideration by this Court is essential to secure uniformity in this area of the law.[21]

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[19] In *Almeida*, co-defendants, acting under a joint defense agreement for over a year, shared information and conducted dozens of meetings. However, a month before trial, a co-defendant defected and became a government witness. The prosecutor urged that defense counsel was prohibited from cross-examining the alienated co-defendant because of a conflict of interest. The Eleventh Circuit held that when each party of a joint defense agreement is represented by his own attorney, communications between defendants and their co-defendants' counsel are not privileged because there is no duty of loyalty to the co-defendants. *Almeida*, 341 F.3d at 1325.

[20] In *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001), the defendant consented to his attorney's representation of another defendant, in a different matter, who was implicated in his murder case. However, the Ninth Circuit determined that the waiver could not be sustained where the defendant did not know that his lawyer would not explore viable defenses because of the dual relationship.

[21] Other courts, which have addressed this or related issues, have also reached conclusions that cannot be reconciled with the Second Circuit's holding in this case. *See, e.g., United*

The Second Circuit has concluded that a defendant's constitutional right to the undivided loyalty of his lawyer may be preempted by an agreement among the attorneys to employ a joint trial strategy, which can undermine that loyalty. This sets a very dangerous precedent that is bound to be exploited and will seriously depreciate the singular devotion owed to a client. This rivalry between disparate views maintained between circuit courts is bound to promote a large measure of confusion in this area of the law that, if not dealt with immediately, will inevitably have profound ramifications.

Now, in every trial where a joint defense strategy exists, a potential conflict looms between the duty a lawyer owes to his client and the obligations he has assumed under a joint defense agreement. It is unsettling to think that a lawyer could forfeit the individual interests of his client simply to fulfill the demands of a joint defense plan. But, that issue has to be resolved to bring order to this area of the law where — under the insurgent Second Circuit decision — defendants, such as Petitioner, can be denied the effective assistance of counsel, as well as due process, because the ineffectiveness is excused by a joint defense agreement.

States v. Weaver, 265 F.3d 1074 (D.C. Cir. 2001) (conflict of interest exists where counsel represented both the defendant and an individual who the defendant had identified to the government, in an attempt to cooperate, as a co-conspirator); *United States v. Hall*, 200 F.3d 962 (6th Cir. 2000) (new trial required where counsel, who represented both defendants at trial, focused on one defendant's case and did not present a full defense for his other client).

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

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Respectfully submitted,

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